

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

WAYDE LYNN KURT,

Movant.

Nos. 2:10-CR-00114-WFN  
2:11-CR-00161-WFN

ORDER DENYING MOVANT'S  
§ 2255 MOTION

Before the Court is pro se Movant's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255, ECF Nos. 209 (2:10-CR-00114-WFN) and 50 (2:11-CR-00161-WFN), to which the Government has not responded. Movant seeks to vacate and set aside the judgments and sentences imposed in both of the above captioned cause numbers.

**PROCEDURAL HISTORY**

Under cause number 2:10-CR-00114-WFN, Movant was charged with being a felon in possession of a firearm. Movant proceeded to trial and the jury returned a guilty verdict. The Court sentenced Movant to 120 months imprisonment. At sentencing, the Court increased Movant's base offense level by four levels for possessing a firearm in connection with another felony and two levels for obstruction of justice.

On direct appeal, Movant argued that the Court erred by (1) refusing to give entrapment instructions, (2) excluding book excerpts and photographs, and (3) applying the two sentencing enhancements. A panel of the Ninth Circuit affirmed the Court's judgment in an unpublished opinion. *United States v. Kurt*, 532 Fed. Appx. 723 (9th Cir. 2013). The Ninth Circuit found that Movant did not present sufficient evidence of inducement to warrant the entrapment instructions. *Id.* at 724. The Ninth Circuit also found no error in the Court's evidentiary rulings and sentencing enhancements. *Id.* at 725-

1 27. Judge Tashima dissented, concluding that the Court should have instructed the jury on  
2 the entrapment defense. Judge Tashima equated the Court's failure to give entrapment  
3 instructions to "enter[ing] a directed verdict for the government." *Id.* at 728 (Tashima, J.,  
4 dissenting).

5 In cause number 2:11-CR-00161-WFN, Movant was charged with Aggravated  
6 Identity Theft (Count 1), Unlawful Production of an Identification Card (Counts 2 and 4),  
7 Unlawful Possession of an Identification Card (Counts 3 and 5), and False Statement  
8 (Count 6). Movant pled guilty to Counts 2 and 6 of the Indictment. The Court sentenced  
9 Movant to 36 months imprisonment for each count, to be served concurrent to one another,  
10 but consecutive to the 120 month sentence imposed in 2:10-CR-00114-WFN. Movant  
11 appealed from the judgment and conviction, but the parties later stipulated to dismiss the  
12 appeal.

13 On April 14, 2014, Movant filed the current Motion alleging ineffective assistance  
14 of counsel.

### 15 APPLICABLE LAW

16 The Sixth Amendment provides that an accused in a criminal prosecution has a right  
17 to the assistance of counsel. U.S. CONST. amend. VI. To show a deprivation of the Sixth  
18 Amendment right to counsel, a movant must establish both that his lawyer's performance  
19 was deficient and that the deficient performance prejudiced his defense. *Strickland v.*  
20 *Washington*, 466 U.S. 668, 687 (1984).

21 A "deficient" performance is one that is not reasonably effective, where an objective  
22 standard guides judgments of reasonableness. *Id.* at 687-88. To satisfy *Strickland's* first  
23 prong, the acts or omissions must fall "outside the wide range of professionally competent  
24 assistance." *Id.* at 690. That is, the defendant must show "that counsel made errors so  
25 serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the  
26 Sixth Amendment." *Id.* at 687. There is a strong presumption that counsel's conduct falls  
27 within the range of reasonable professional assistance. *Id.* at 689.

28 A deficient performance prejudices a defense if there is "a reasonable probability  
that, but for counsel's unprofessional errors, the result of the proceeding would have been

1 different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine  
2 confidence in the outcome." *Id.* *Strickland's* second prong thus "requires showing that  
3 counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose  
4 result is reliable." *Id.* at 687. A Court need not address the prejudice prong if counsel's  
5 performance was not deficient. *United States v. Sanchez-Cervantes*, 282 F.3d 664, 672  
6 (9th Cir. 2002).

### 7 DISCUSSION

8 Movant contends that his trial counsel was ineffective as counsel failed to (1)  
9 correct the Court's misapprehension of certain facts on which the Court based its decision  
10 not to instruct the jury on entrapment, (2) raise "fear" as the Government's inducement of  
11 entrapment, (3) appeal a prior conviction used at sentencing that was constitutionally  
12 "infirm and void," and (4) object to a special condition of supervised release requiring  
13 Movant to undergo a mental health evaluation.

#### 14 **1. Movant fails to show that counsel was ineffective by failing to correct the** 15 **Court's misapprehension of certain facts on which the Court based its decision not to** 16 **instruct the jury on entrapment.**

17 Movant argues that defense counsel was ineffective during the jury instruction  
18 conference because counsel did not "correct" the Court's erroneous understanding of the  
19 facts of the case and because counsel did not object to the "directed verdict" that resulted  
20 from the Court's decision not to instruct the jury on entrapment. Movant argues that  
21 defense counsel should have submitted a written brief challenging the Government's  
22 portrayal of, and the Court's misunderstanding of, the facts presented at the jury instruction  
23 conference.

24 Movant fails to show that defense counsel's performance was deficient. Defense  
25 counsel vigorously objected to the Court's decision not to give the entrapment instructions.  
26 At the jury instruction conference, counsel set forth all the facts that he believed justified  
27 the instructions. Defense counsel argued that David Udseth, the Government informant,  
28 encouraged Movant to obtain weapons, specifically a reloader. (Tr. at 861.) (Udseth  
himself denied that he encouraged Movant to obtain a reloader (Tr. at 215) and Movant

1 testified that Udseth did not threaten or coerce him into obtaining weapons (Tr. at 790-  
2 71)). Counsel also argued that Movant did not obtain any weapons until after discussions  
3 with Udseth in August 2010. (Tr. at 862.) (A significant amount of evidence suggested  
4 that Movant possessed some firearms prior to August 2010.) Counsel further argued that  
5 the Court must consider entrapment in the "context" of Movant joining, and later  
6 withdrawing from, the Vanguard Kindred, "the assault on Anthony [Johnson]," and  
7 Movant's relationship with Udseth. (Tr. at 862-63.)

8 Although Movant frames this issue as a failure on the part of defense counsel,  
9 Movant is essentially challenging the Court's decision not to instruct the jury on  
10 entrapment. On direct appeal, the Ninth Circuit concluded that the Court did not abuse its  
11 discretion in finding that no reasonable jury could conclude that Movant was entrapped.  
12 The Ninth Circuit found that "[Movant] provided no evidence of government pressure or  
13 incentives that would prompt a law-abiding person to commit the offense." *Kurt*, 532 Fed.  
14 Appx. at 725. The Ninth Circuit did not question or criticize the Court's understanding of  
15 the facts presented by counsel at the jury instruction conference. Under such  
16 circumstances, defense counsel did not act unreasonably by failing to "correct" the Court's  
17 understanding of the facts or by failing to request leave to file a written brief. Movant fails  
18 to overcome the presumption that defense counsel acted "within the wide range of  
19 professionally competent assistance." *Strickland*, 466 U.S. at 690.

20 **2. Movant fails to show that defense counsel was ineffective by failing to argue**  
21 **that Movant's fear of Udseth constituted inducement for purposes of entrapment.**

22 Movant argues that defense counsel was ineffective because counsel did not argue  
23 that Movant's fear for his friends and family constituted inducement and provided grounds  
24 for entrapment instructions. Movant argues he obtained weapons at the behest of Udseth  
25 out of fear for the safety of Anthony Johnson (Movant's "adopted homeless person"). ECF  
26 No. 209-1 at 12 (2:10-CR-00114-WFN); ECF No. 51 at 12. Movant claims that defense  
27 counsel could have established fear as the inducement for entrapment by presenting  
28 evidence regarding Udseth's affiliation with white supremacy groups and association with  
Keegan Van Tuyl, a white supremacy group leader. Movant claims that defense counsel

1 was ineffective because counsel failed to impeach Udseth on these grounds. Movant also  
2 claims that defense counsel was ineffective by failing to subpoena or present evidence  
3 including recorded phone calls between Van Tuyl and Udseth and newspaper articles  
4 about Van Tuyl.

5 The Court finds Movant's argument flawed because fear of a government agent is  
6 "insufficient to entitle [a defendant] to an instruction on entrapment." *United States v.*  
7 *Saturley*, 1989 WL 145363, at \*1 (9th Cir. 1989); *see also id.* (noting that "such fear . . .  
8 would lead to a defense of duress rather than entrapment."). Because fear of a government  
9 agent is insufficient to show inducement for purposes of entrapment, defense counsel was  
10 not ineffective for failing to pursue the strategy now advanced by Movant. Movant also  
11 fails to show that defense counsel's impeachment of Udseth or presentation of evidence  
12 rises to the level of deficient performance. *See Reynoso v. Giurbino*, 462 F.3d 1099, 1113  
13 (9th Cir. 2006) ("[M]atters such as counsel's approach to impeachment are often viewed as  
14 tactical decisions, and such decisions do not constitute deficient conduct simply because  
15 there are better options.") (internal quotation marks omitted). Movant fails to overcome  
16 the presumption that defense counsel acted "within the wide range of professionally  
17 competent assistance" by failing to argue that Movant's fear of Udseth constituted  
18 inducement for purposes of entrapment. *Strickland*, 466 U.S. at 690.

19 **3. Movant fails to show that counsel was ineffective by failing to appeal the**  
20 **Court's use of a prior conviction to calculate Movant's criminal history.**

21 Movant argues that defense counsel was ineffective because counsel failed to appeal  
22 the Court's use of a prior conviction to calculate Movant's criminal history because the  
23 conviction was constitutionally infirm and presumptively void. Movant is referring to a  
24 2004 conviction for Theft of Government Property, for which the Court sentenced Movant  
25 to 18 months imprisonment. In that case, Movant was convicted for theft of a vehicle  
26 tracking device placed on his vehicle by United States Secret Service agents. The Ninth  
27 Circuit affirmed Movant's conviction. *United States v. Kurt*, 143 Fed. Appx. 848 (9th Cir.  
28 2005).

1 At sentencing, defense counsel argued that Movant's Theft of Government Property  
2 conviction was "constitutionally infirm and presumptively void" because the Government  
3 "abandoned" the tracking device by placing it on Movant's vehicle. *See* ECF No. 168 at  
4 14-15. The Court found this argument meritless and assigned the conviction three criminal  
5 history points as recommended in the Presentence Investigation Report (PSR). Defense  
6 counsel did not appeal the Court's ruling on this issue. In the pending motion, Movant  
7 presents the exact same argument and claims that counsel was ineffective for failing to  
8 appeal the issue.

9 "Claims of ineffective assistance of appellate counsel are reviewed according to the  
10 [same standard that applies to trial counsel]." *Turner v. Calderon*, 281 F.3d 851, 872 (9th  
11 Cir. 2002). "To be constitutionally effective, counsel need not appeal every possible  
12 question of law." *Id.* (internal quotation marks omitted). Appellate counsel need not  
13 appeal issues that have no merit or issues that are clearly untenable. *Id.*

14 Movant fails to show that defense counsel was ineffective by failing to appeal the  
15 Court's refusal to discount the criminal history points assigned to Movant's 2004 Theft of  
16 Government Property. Given that Movant's 2004 conviction was upheld on appeal, the  
17 argument that the conviction is "constitutionally infirm and presumptively void" has no  
18 merit and is clearly untenable. Movant fails to overcome the presumption that defense  
19 counsel acted "within the wide range of professionally competent assistance" by not  
20 appealing this issue. *Strickland*, 466 U.S. at 690.

21 **4. Movant fails to show that defense counsel was ineffective by failing to object**  
22 **to the special condition of supervised release requiring Movant to participate in a**  
23 **mental health evaluation.**

24 The Court sentenced Defendant in both cases on May 15, 2012. In both cases, the  
25 Court imposed Special Condition 14, which requires Movant to "complete a mental health  
26 evaluation and follow any treatment recommendations of the evaluating professional  
27 [(subject to some exceptions)]." (ECF No. 178 at 4 (2:10-CR-00114-WFN); ECF No. 38  
28 at 4.) Movant argues that defense counsel was ineffective by failing to object to this  
special condition of release.



1 "A district court has broad discretion to impose supervised release conditions."  
2 *United States v. Lopez*, 258 F.3d 1053, 1056 (9th Cir. 2001). 18 U.S.C. § 3583(d)

3  
4 allows a court to impose any condition it considers to be appropriate so long  
5 as the condition is reasonably related to the factors set forth in § 3553,  
6 involves no greater deprivation of liberty than reasonably necessary to afford  
7 adequate deterrence to criminal conduct; to protect the public from further  
8 crimes of the defendant; to provide the defendant with needed educational or  
9 vocational training, medical care, or other correctional treatment in the most  
effective manner, and is consistent with any pertinent policy statements in the  
guidelines.

10 *Id.* at 1056-57 (internal quotation marks and footnote omitted).

11 "[A] condition requiring participation in a mental health program is a routine (albeit  
12 "special") condition of supervised release." *Id.* at 1056. The United States Sentencing  
13 Guidelines recommend that a special condition of mental health program be imposed "[i]f  
14 the court has reason to believe that the defendant is in need of psychological or psychiatric  
15 treatment." U.S.S.G. § 5D1.3(d)(5). Even in the absence of evidence that a defendant is  
16 mentally ill, the Court may still require a defendant to participate in a mental health  
17 evaluation when a defendant's underlying criminal conduct is of a "violent, fanatical and  
18 highly destructive nature." *United States v. Williams*, 52 Fed. Appx. 983, 985 (9th Cir.  
19 2002).

20 As detailed in the PSR, and as observed by the Court during trial, Movant has a  
21 twisted worldview and has no remorse for his actions. Movant has, at one time or another,  
22 planned to carry out a "final solution," kill the President of the United States, and engage  
23 in acts of terrorism similar to the Oklahoma City bombing. Movant has a lengthy criminal  
24 history, mostly involving counterfeiting, but believes that he has done nothing illegal. *See*,  
25 *e.g.*, Tr. at 771 ("I don't think I did anything to harm anyone, ever."). Movant's prior  
26 periods of supervised release have been unsuccessful. A mental health evaluation may  
27 reveal that Movant has no psychological abnormalities or may suggest that Movant needs  
28 mental health treatment. Treatment may deter Movant from continuing to engage in  
criminal activities and help him understand right from wrong. A mental health evaluation

1 and subsequent treatment may also protect the public from the various consequences of  
 2 Movant's fanatical and destructive behavior. Defense counsel was not deficient by failing  
 3 to object to this special condition of release because there were no grounds for objection.  
 4 Special Condition 14 provides Movant with "needed . . . correctional treatment," 18 U.S.C.  
 5 § 3553(a)(2), and involves no greater deprivation of liberty than is reasonably necessary to  
 6 achieve these ends, *id.* § 3583(d).

### 7 **CERTIFICATE OF APPEALABILITY**

8 An appeal of this Order may not be taken unless this Court or a Circuit Judge  
 9 issues a certificate of appealability, finding that "the applicant has made a substantial  
 10 showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires  
 11 a showing that "reasonable jurists would find the district Court's assessment of the  
 12 constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).  
 13 Based on the Court's preceding analysis, the Court concludes jurists of reason would not  
 14 find the Court's rulings debatable. Thus, a certificate of appealability should not issue.  
 15 Accordingly,

#### 16 **IT IS ORDERED** that:

17 1. Movant's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C.  
 18 § 2255, filed April 14, 2014, **ECF Nos. 209 (2:10-CR-00114-WFN) and 50 (2:11-CR-**  
**00161-WFN)**, is **DENIED**.

19 2. Movant's Motion Requesting Court Records as an Indigent, filed April 14, 2014,  
 20 **ECF Nos. 211 (2:10-CR-00114-WFN) and 53 (2:11-CR-00161-WFN)**, is **DENIED**.  
 21 Movant adequately cites to the record where appropriate. Movant fails to demonstrate  
 22 how any of the requested transcripts are pertinent to the issues raised in his § 2255 motion.

23 3. Movant's Motion Setting Hearing Date, filed April 14, 2014, **ECF Nos. 212**  
 24 **(2:10-CR-00114-WFN) and 54 (2:11-CR-00161-WFN)**, is **DENIED**.

25 The District Court Executive is directed to:

- 26 • File this Order and provide copies to pro se Movant and to the United States
- 27 Attorney in Spokane, Washington;



- 1 • Inform the Ninth Circuit Court of Appeals that if the Movant files a Notice of  
2 Appeal that a certificate of appealability is **DENIED**; and
- 3 • **CLOSE** the corresponding civil files, **2:14-CV-00099-WFN** and **2:14-CV-00100-**  
4 **WFN.**

5 **DATED** this 28th day of April, 2014.

6  
7  
8 s/ Wm. Fremming Nielsen

9 WM. FREMMING NIELSEN

10 SENIOR UNITED STATES DISTRICT JUDGE

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